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No. 89-1227
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1989

CSXT, INC.,

Petitioner,

v.

JAMES J. PITZ, DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN, NORMA J. FLEMING, ADMINISTRATOR OF THE RAILROAD SAFETY AND TARIFFS DIVISION OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN and THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN
and
UNITED TRANSPORTATION UNION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

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70 pp

QUESTION PRESENTED

Where the State has initiated proceedings against a railroad company to enforce the State's rule requiring that adequate toilet facilities be made available for rail workers, is Younger abstention appropriate in the federal court action subsequently filed by the railroad to enjoin the State's proceedings on preemption grounds?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The petition omits reference to the following provisions of Michigan law necessary for consideration of the judicial nature of MDOT's proceeding:

1. Article VI, § 28 of the Michigan Constitution of 1963 provides, in relevant part:

> "All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law."

2. Chapter 4 of the Michigan Administrative Procedures Act of 1969 is

set forth verbatim in Respondents' Appendix. MICH. COMP. LAWS ANN. §§ 24.271-24.282, 24.285-24.287 (1981).

STATEMENT OF THE CASE

On January 4, 1988 Respondent Michigan Department of Transportation's (MDOT) Office of Administrative Law Hearings issued its Notice of Hearing on complaints made against Petitioner CSXT, Inc. (CSXT) filed with MDOT's Railroad Safety & Tariffs Division (Railroad Safety Division) by Respondent United Transportation Union. (Petition, Appendix G-12). The complaints alleged that CSXT failed to make toilet facilities available to its rail workers on a number of its trains operating in Michigan, contrary to Rule 460.1473(a) (Michigan's Rule) which provides:

> "Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition." MICH. ADMIN. CODE R. 460.1473 (1979).

The hearing was to have been conducted in accordance with chapter 4 of Michigan's Administrative Procedures Act relating to "contested cases". (Petition, Appendix G-13).

Thereafter, CSXT filed suit in the federal district court seeking to enjoin the State's administrative proceedings on the ground that Michigan's Rule was preempted by the Locomotive Boiler Inspection Act (LBIA), 45 U.S.C. §§ 22-43 (1986) and the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. §§ 421-44 (1986). CSXT also brought a motion before MDOT's Administrative Law Judge to stay the State's administrative proceedings pending resolution of the federal district court action, which motion was denied. In denying CSXT's

motion, the Administrative Law Judge noted that the Rule promoted the health, safety, and welfare of the citizens of the State and was well within the State's police power. The Administrative Law Judge was also unwilling to presume that the federal laws relied on by CSXT were intended to prohibit state regulation in an area "so basic to public health." (Petition, Appendix G-18-G-19).

The State's administrative proceedings progressed no further, however, having been preliminarily enjoined by the federal district court until such time as the court ruled on CSXT's motion for summary judgment. Prior to the date set for hearing on the motion, the district court issued its opinion and order granting CSXT's motion, declaring Michigan's Rule

preempted by both the Locomotive Boiler Inspection Act and the Federal Railroad Safety Act and permanently enjoining further enforcement of the Rule insofar as it required commodes on locomotives operating in Michigan. (Petition, Appendix D).

MDOT and Intervenor-UTU appealed to the Sixth Circuit Court of Appeals, which ruled that the district court should have abstained from interfering with the ongoing railroad safety proceeding in the Michigan Department of Transportation pursuant to the judicially-crafted rule announced in Younger v Harris, 401 U.S. 37 (1971). (Petition, Appendix B-12). In so ruling, the Sixth Circuit found that the State's proceedings were judicial in nature, implicated important

state interests in preventing pollution and disease and afforded an adequate opportunity for review of constitutional challenges. (Petition, Appendix B-9-B-12).

CSXT moved for a Stay of Mandate, which motion was granted, and filed its Petition for Writ of Certiorari with this Court. Thus, no hearing has yet been held before MDOT's Administrative Law Judge, nor has the Administrative Law Judge yet had an opportunity to issue a definitive order or ruling interpreting and enforcing Michigan's Rule.

SUMMARY OF REASONS FOR DENYING PETITION

Now before this Court is an abstention case in which the Sixth Circuit carefully and correctly applied both

Michigan law and the rulings of this Court. Having determined that Younger abstention was appropriate on the unique facts of this case, the Sixth Circuit did not address the merits of Petitioner's preemption claims. Accordingly, no conflict of decisions is presented by this case and no further review by this Court is warranted.

Nor does this case raise an important question of federal law in need of resolution by this Court. At issue is whether abstention is appropriate in the face of a preemption challenge, a question already resolved by this Court in the affirmative. Contrary to Petitioner's assertion, the unique facts of this case do not raise the issue of a facially conclusive preemption challenge

to foreclosed state regulation of locomotives. Nowhere on the face of the rule at issue in this case is the regulation of locomotives conclusively established; indeed, Michigan's rule expressly states that adequate toilet facilities "shall be made available for trainmen, enginemen and yardmen" without any reference to "locomotives" whatsoever.

No conflict of decisions is presented by this case and no important question of federal law is raised. Accordingly, the petition should be denied.

ARGUMENT

I

THE SIXTH CIRCUIT RENDERED A DECISION ON ABSTENTION, NOT ON PREEMPTION. ITS DECISION THAT YOUNGER ABSTENTION WAS APPROPRIATE UNDER THE PARTICULAR FACTS OF THIS CASE WAS ENTIRELY CONSISTENT WITH, AND INDEED MANDATED BY, THE APPLICABLE DECISIONS OF THIS COURT AND THERE IS NO CONFLICT OF DECISIONS WARRANTING REVIEW BY THIS COURT.

Petitioner attempts to characterize the Sixth Circuit's opinion as a preemption case in which the Court held that the LBIA and the FRSA permit state regulation of locomotives, then sets out to prove that these "holdings" are in conflict with the preemption decisions of this Court and other federal appeals courts construing these acts. The Sixth Circuit, however, rendered no such "holdings". Rather, the Sixth Circuit held that the abstention standards arti-

culated by this Court in a series of cases were clearly met on the facts of this case. The Sixth Circuit's abstention holding is entirely consistent with, and indeed mandated by, the decisions of this Court beginning with Younger v Harris, 401 U.S. 37 (1971), and continuing through Middlesex County Ethics Committee v Garden State Bar Ass'n, 457 U.S. 423 (1982), to Ohio Civil Rights Commission v Dayton Christian Schools, Inc., 477 U.S. 619 (1986), and finally to this Court's most recent pronouncement in New Orleans Public Service, Inc. v Council of City of New Orleans (NOPSI), 491 U.S. ____, 109 S. Ct. 2506 (1989). There is no conflict of decisions for this Court to review and no error for this Court to correct.

A. The Sixth Circuit's Abstention Ruling Was Correct.

Specifically, the Sixth Circuit's ruling that Younger abstention was appropriate on the facts of this case was based on sound reasoning. Noting that CSXT's challenge to the State's enforcement proceedings was based on federal preemption, the Sixth Circuit proceeded to consideration of whether the nature of CSXT's challenge warranted deviation from traditional abstention analysis. In holding that abstention cases involving preemption should not be treated differently than other abstention cases, the Sixth Circuit followed this Court's recent ruling in the NOPSI case, supra, where the question was laid to rest:

> "[O]ne of the issues in the present case is whether the principle of Younger can properly be extended to this type of suit. NOPSI argues that

> Younger does not require abstention in the face of a substantial claim that the challenged state action is completely pre-empted by federal law. ... We disagree."
> 883 F.2d at 472 n. 4 quoting NOPSI, 491 U.S. at ____, 109 S. Ct. at 2516 (See Petition, Appendix B-5).

The Sixth Circuit then correctly identified the applicable criteria that must be met in determining whether abstention is appropriate, as set forth in Middlesex County, supra, as follows:

> "[F]irst, do [the relevant state proceedings] ... constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges."
> 883 F.2d at 474 quoting Middlesex, 457 U.S. at 432, 102 S. Ct. at 2521 (See Petition, Appendix B-9).

The Sixth Circuit found that all three criteria were met on the facts of

this case.[1] Specifically, the Sixth Circuit found that an adequate opportunity was afforded CSXT to raise its preemption challenge in the state proceedings, because Michigan's Administrative Procedures Act provides for full judicial review of such questions. 883 F.2d at 474-475 (See Petition, Appendix E-10-B-11). As to the importance of the State's interest in pursuing its enforcement proceedings, the Sixth Circuit ruled that preventing the risk of pollution and disease is one of the preeminent functions of the State's police power to protect the health and safety of its residents. 883 F.2d at 475 (See Petition, Appendix B-11-B-12).

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[1]Of these three criteria, Petitioner disputes only the Sixth Circuit's finding with regard to the judicial nature of MDOT's proceeding. See Argument III, infra.

And finally, as discussed more fully under Argument III, infra, the Sixth Circuit also ruled, with regard to the first of the Middlesex criteria, that the State's proceedings constituted an ongoing state judicial proceeding under the NOPSI rationale recently articulated by this Court. On this point, the Sixth Circuit noted NOPSI's instruction that an agency's proceeding should be characterized as legislative or judicial depending on the nature of the "final act" the proceeding is designed to produce. 883 F.2d at 474 (See Petition, Appendix B-10). As MDOT's proceeding was designed to facilitate the interpretation and application of the State's rule requiring "adequate toilet facilities" as well as a determination whether CSXT was liable for a violation of the rule, the

Sixth Circuit correctly determined that MDOT's proceeding was judicial in nature. 883 F.2d at 474 (See Petition, Appendix B-10). This conclusion is consistent with, and indeed mandated by, NOPSI, and is fully supported by Michigan's Constitution and applicable statutes. (See Argument III, infra).

B. The Sixth Circuit's Abstention Ruling Did Not Purport To Reach The Merits Of Petitioner's Preemption Claim And Is Not At Odds With Decisions Of This Court On Preemption.

As shown above, it simply cannot be disputed that, in ruling abstention was appropriate on the facts of this case, the Sixth Circuit adhered strictly to all applicable precedents of this Court relating to abstention. In its first two arguments, however, CSXT attempts to

characterize the Sixth Circuit's opinion as having reached and ruled upon the merits of CSXT's preemption claims in a manner that conflicts with decisions of this Court and other federal appeals courts. For several reasons, CSXT's position is simply not supportable.

First, the Sixth Circuit did not rule on the merits of CSXT's preemption claims; its focus was plainly limited to the abstention argument presented:

> "This appeal requires us to answer two questions. First, does the fact that this case raises preemption rather than other types of constitutional issues require us to modify the classic abstention analysis? And second, once the proper mode of analysis is determined, does it require abstention in this case?"
> 883 F.2d at 471 (See Petition, Appendix B-3-B-4).

As revealed by the above passage, to the extent the Sixth Circuit discussed

preemption, that discussion was designed to identify the type of constitutional challenge CSXT was raising to the State's proceedings for abstention analysis purposes, not to pass on the underlying merits of the preemption challenge.

Nor is CSXT's characterization to the contrary supported anywhere else in the text of the Sixth Circuit's opinion. None of the Sixth Circuit's remarks relating to the LBIA and FRSA are essential to the Court's determination on abstention. As such, the remarks constitute obiter dictum and lack the force of an adjudication warranting review by this Court.

Even more importantly, however, the Sixth Circuit's dicta are fully supportable in federal statutory and case

authority and do not conflict with decisions of this Court or other federal appeals courts. Petitioner claims the Sixth Circuit ruled that neither the LBIA nor the FRSA preempts states from regulating locomotives. The statements made by the Court relied upon by Petitioner to support this characterization are: 1) that the LBIA "'lists certain equipment required for locomotives and railroad cars ... does not prohibit concurrent state regulation or purport to occupy the field of railroad [regulation]'"; and 2) that the FRSA allows the Secretary of Transportation to "'prescribe appropriate rules for all areas of railroad safety,' including rules concerning equipment and operating procedures. The act allows limited concurrent state regulation." (Petition,

pp 6, 9) (citations omitted) (emphasis supplied).

One need only read these statements relied upon by Petitioner to conclude that CSXT's reliance is misplaced. These statements themselves refer broadly to railroad regulation, not narrowly to locomotive regulation. Yet all the cases cited by Petitioner as conflicting with the Sixth Circuit's opinion, including Napier v Atlantic Coast Line R. Co., 272 U.S. 605 (1926), narrowly address locomotive regulation. These cases are not applicable and cannot serve to support the conflict urged by Petitioner.

On the other hand, the Sixth Circuit's statements relating generally to state railroad regulation are fully supportable. The Sixth Circuit is

correct in its assertion that the LBIA does not prohibit all state railroad regulation. By its terms, the LBIA relates only to the locomotive. 45 U.S.C. §§ 22-23. The LBIA does not, for example, preclude state regulation of the caboose. Missouri Pacific Railroad Company v Railroad Commission of Texas, 833 F.2d 570, 576 (5th Cir., 1987). Similarly, by its terms, the FRSA permits state regulation of railroads except where a federal rule or standard covers the subject matter of the state requirement. 45 U.S.C. § 434.

The Sixth Circuit's abstention ruling is correct and should not be considered by this Court.

II

THERE IS NO FACIALLY CONCLUSIVE PREEMPTION CLAIM PRESENT IN THIS CASE. THE SIXTH CIRCUIT'S OPINION REPRESENTS A RELATIVELY ROUTINE APPLICATION OF ESTABLISHED ABSTENTION DOCTRINE AND DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WARRANTING REVIEW BY THIS COURT.

In June of 1989, this Court decided NOPSI where, as stated above, this Court ruled that Younger required abstention even in the face of a substantial claim that the challenged State action is completely preempted by federal law. NOPSI, 491 U.S. at ____, 109 S. Ct. at 2516. Also in NOPSI, however, Justice Scalia, writing for the majority, offered the following speculation about the sufficiency of a facially conclusive preemption claim to render abstention inappropriate:

> "Thus, NOPSI argues, even if a substantial claim of federal pre-

> emption is not sufficient to render abstention inappropriate, at least a facially conclusive claim is. Perhaps so. But we do not have to decide the matter here, since the proceeding and order at issue do not meet that description."
> NOPSI, 491 U.S. at ___, 109 S. Ct. at 2517.

While the order and proceeding in NOPSI did not present a facially conclusive preemption question, Petitioner argues that this case does. This is simply not so for a number of reasons.

First, according to Petitioner, its claim of preemption is facially conclusive because the "[r]egulation of locomotive equipment is directly foreclosed by the LBIA, the FRSA, the regulations supplementing those statutes, and the case law applying them" and "MDOT has sought directly to regulate equipment on CSXT locomotives... ." (Petition, p 12).

As was seen in its attempt to characterize the Sixth Circuit's ruling as relating to preemption and locomotives, however, here too CSXT is attempting to force a focus on locomotives that is not supported on the facts of this case.

Most telling in this regard is the fact that, in its argument on this point, Petitioner has failed to make a single reference to the one authority of greatest relevance to it -- Michigan's Rule. The Rule which the Railroad Safety Division seeks to enforce against CSXT states in relevant part:

> "Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition." MICH. ADMIN. CODE R. 460.1473 (1979).

On its face, the Rule requires "adequate toilet facilities." On its

face, the Rule requires that those adequate toilet facilities "be made available" for trainmen, enginemen, and yardmen. On its face, the Rule requires that those toilet facilities "be kept in a reasonably clean and sanitary condition." Nowhere on its face, however, does the Rule require that toilets be installed on locomotives. Accordingly, Petitioner's contention that this case presents a facially conclusive preemption challenge is without support in the record of this case and should not be reviewed by this Court.

Instead of focusing on the Rule itself, Petitioner contends that the "undisputed actions of MDOT enforcing the Rule" should suffice to render Petitioner's claim of preemption facially

conclusive. (Petition, p 15, n. 3). CSXT has failed to identify specifically what those "undisputed actions" are, however, making direct response somewhat more difficult. Nevertheless, it is presumed that Petitioner is referring to the positions taken by the personnel in MDOT's Railroad Safety Division and representatives of the United Transportation Union in correspondence, and through the initial inspection process and other pre-hearing activities, and by counsel for the Railroad Safety Division in related federal court proceedings to the effect that Michigan's Rule should be construed to require toilets on locomotives. Indeed, had the scheduled proceedings before the Administrative Law Judge gone forward, one of the interpretations of Michigan's

Rule counsel for the Railroad Safety Division had planned to urge the Administrative Law Judge to adopt was that the Rule required CSXT to make toilets available on locomotives.

Never has it been suggested, however, by CSXT or by anyone else, that any of these actions or statements represented MDOT's final and authoritative construction of the Rule. It has never been questioned that only one individual in MDOT has been delegated the authority to construe and definitively apply MDOT's Rule. That individual is not an employee of the Railroad Safety Division or a representative of the United Transportation Union and is not counsel for the Railroad Safety Division. The sole person delegated the authority to

interpret and apply MDOT's Rule is MDOT's Administrative Law Judge "after hearing thereon."

Moreover, it is important to recall that the Administrative Law Judge before whom the State's enforcement action was to have proceeded never heard the State's case or the case of any other of the parties, because all state proceedings were enjoined by order of the district court and subsequent stays pending appeal. Thus, no authoritative interpretation or construction of Michigan's Rule has yet been rendered at the state level and accordingly it cannot be known at this time whether the Administrative Law Judge's ruling would have resulted in regulation of locomotives at all. For example, the Administrative Law Judge may

well have construed MDOT's Rule to require CSXT to make toilets available on CSXT's cabooses or along the tracks on scheduled stops and off the train entirely.

As shown above, the unique facts of this case do not present the facially conclusive preemption claim alluded to by Justice Scalia in NOPSI sufficient to render inapplicable all the principles respecting comity on which abstention doctrine is based. The Rule at issue in this case does not even refer to locomotives and no authoritative agency construction of the Rule is available to examine. The Sixth Circuit correctly applied NOPSI and no further review is warranted by this Court.

III

THE SIXTH CIRCUIT'S DECISION THAT MDOT'S ADMINISTRATIVE PROCEEDING WAS JUDICIAL IN NATURE IS BOTH CONSISTENT WITH MICHIGAN LAW AND COMPELLED BY THIS COURT'S RECENT RULING IN NOPSI.

In it's final argument, Petitioner claims that the Sixth Circuit erred in ruling that MDOT's enjoined administrative proceeding is judicial in nature because Michigan's Constitution forbids the exercise of judicial powers by MDOT. In support of its contention, CSXT relies on article III, section 2 of Michigan's Constitution in which separate powers are established for the executive, legislative, and judicial branches of government. (Petition, p 17). In addition, Petitioner cites cases of the Michigan Supreme Court decided in 1919 and 1933 for the general proposition that the

constitutional prohibition of article III, section 2 prevents administrative agencies from exercising purely judicial functions. (Petition, pp 16-17). For at least three reasons, Petitioner's argument is without merit and should not be reviewed by this Court.

First, Petitioner misapprehends the NOPSI ruling. The focus of the NOPSI rationale was not on whether an administrative agency exercises judicial or legislative power, but rather on whether the particular administrative proceeding at issue was judicial or legislative in nature. As correctly stated by the Sixth Circuit in its discussion of NOPSI, the inquiry should focus on the "nature of the final act" the proceeding is designed to produce. 883 F.2d at 474 (See

Petition, Appendix B-10). A proceeding which "investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist," is judicial. 883 F.2d at 474, citing NOPSI (See Petition, Appendix B-10).

Nor does NOPSI stand as the lone decision of this Court counselling such an approach. In Gibson v Berryhill, 411 U.S. 564, 576-577 (1979), this Court made clear that state administrative proceedings may "command the respect due court proceedings" such as where they look to the revocation of a medical license. In Middlesex County Ethics Committee v Garden State Bar Ass'n, supra, 457 U.S. at 432-434, this Court held that federal courts should not

enjoin state lawyer disciplinary proceedings intitiated by state ethics committees, finding that such proceedings were "judicial in nature". And in Ohio Civil Rights Commission v Dayton Christian Schools, Inc., 477 U.S. 619, 627-628 (1986), this Court ruled that the federal court should have abstained from hearing a civil rights action brought by a religious school seeking to enjoin the Ohio Civil Rights Commission from continuing its administrative proceedings against the school for violations of Ohio's employment laws relating to discrimination and retaliatory discharge. In Dayton Christian Schools, as in all of the above cases, the Court looked to whether the administrative proceeding was "judicial in nature", not to whether the agency was exercising strictly judicial

power.[2]

Second, Petitioner's argument is premised on article III, section 2 of the Michigan Constitution, which, according to Petitioner, forbids the exercise of judicial power by administrative agencies in the State of Michigan. Petitioner has failed to cite to this Court, however, a more directly applicable article of Michigan's Constitution, article VI, section 28, which provides in relevant part as follows:

> "All final decisions, findings, rulings and orders of any administra-

[2]The heading to Petitioner's fourth argument states that the Sixth Circuit's decision is "in conflict with applicable decisions of this Court. ..." (Petition, p 16). Respondent is unable to identify within the body of Petitioner's argument, however, reference to any such conflicting case. Accordingly, Respondent's argument addresses only the asserted conflict with Michigan authorities.

> tive officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. ..." MICH. CONST. art. VI, § 28 (emphasis added).

The Convention Comment to article VI, section 28 of Michigan's 1963 Constitution explains:

> "This is a new section recognizing the increased significance assumed by administrative law in the legal system of the state in recent years. It provides that decisions, findings, rulings and orders of administrative officers or agencies which [a]ffect private rights be subject to judicial review." Comment to MICH. CONST. art. VI, § 28 (emphasis added).

The 1919 and 1933 cases relied upon by Petitioner are relevant to Michigan's

then effective 1908 Constitution, but are not applicable to Michigan's current Constitution. Unlike its predecessors, Michigan's 1963 Constitution recognizes the "increased significance assumed by administrative law in the legal system of the state." Id.

And finally, not only does Michigan's Constitution fully support the Sixth Circuit's finding that MDOT's proceedings are judicial in nature, Michigan's statutory provisions are equally supportive. Petitioner has failed to cite this Court to the most comprehensive and directly applicable of Michigan's statutes, the Michigan Administrative Procedures Act of 1969 (MAPA), pursuant to which MDOT's proceedings were scheduled to be heard. MICH. COMP. LAWS §§ 24.271-24.282,

24.285-24.287 (1981), (MICH. STAT. ANN. §§ 3.560(171)-3.560(182), 3.560(185-3.560(187) (Callaghan 1985)). A review of chapter 4 of the MAPA reveals beyond question the "judicial nature" of MDOT's proceeding. (Appendix 1a-24a).

Specifically, the MAPA provides that the parties to a contested case must receive notice of a hearing and an opportunity to present evidence and argument. (MAPA, § 72, Appendix 3a-4a). Cross-examination of witnesses is permitted as is presentation of rebuttal evidence. (MAPA, § 72, Appendix 3a-4a). Authorized agencies may issue subpoenas and oaths may be administered. (MAPA, § 74, Appendix 5a-7a). The rules of evidence are applied as far as practicable and only evidence made a part of the record

may be considered in a determination of the case. (MAPA, §§ 75, 76, Appendix 7a-9a). Final decisions or orders must be made in writing or on the record and must include findings of fact and conclusions of law. (MAPA, § 85, Appendix 20a). The decision or order is then subject to review in the courts as provided by law. These provisions confirm that Michigan's administrative hearings are quintessentially "judicial in nature."

In light of the above authorities, the Sixth Circuit's decision that MDOT's proceeding is judicial in nature is sound under Michigan law and should not be reviewed by this Court.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Respondent respectfully submits that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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RESPONDENTS' APPENDIX

CHAPTER 4.
PROCEDURES IN CONTESTED CASES

24.271 Parties in contested case; time and notice of hearing; service of notice or other process on legislator.

Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

(3) A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he or she is a member. However, a member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of

the house of which he or she is a member, if such service of notice or process is executed by certified mail, return receipt requested.

24.272 Defaults, written answers, evidence, argument, cross-examination.

Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and

an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

24.273 Subpoenas; issuance; revocation.

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the produc-

tion of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

24.274 Oaths; depositions; disclosure of agency records.

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to

a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to

disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

24.275 Evidence; admissibility, objections, submission in written form.

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege

recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

24.276 Evidence to be entered on record; documentary evidence.

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under

section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

24.277 Official notice of facts; evaluation of evidence.

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which

pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

24.278 Stipulations; disposition of cases, methods.

Sec. 78. (1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

24.279 Presiding officers; designation; disqualification, inability.

Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated an authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial matter. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of

the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

24.280 Presiding officer; powers and duties; "nonmeeting day" defined.

Sec. 80. (1) A presiding officer may do all of the following:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and

the production of books, papers, and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

(f) Act upon an application for an award of costs and fees under sections 121 to 127.

(2) In order to assure adequate representation for the people of this state, when the presiding officer knows

that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(3) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the

legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(4) In order to assure adequate representation for the people of this state, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested

case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.

(5) The presiding officer shall notify all parties to the contested case, and their attorneys, of any continuance granted pursuant to this section.

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

24.281 Proposals for decision; contents.

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, pre-

pared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

24.282 Communications by agency staff; limitations; exceptions.

Sec. 82. Unless required for disposition of an ex parte matter authorized by

law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency

employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.

24.285 Final decisions and orders.

Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language,

shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact which would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence. A copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

24.286 Official records of hearings.

Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof, objections and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

24.287 Rehearings.

Sec. 87. (1) An agency may order a rehearing in a contested case on its own motion or on request of a party.

(2) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of judicial review, the agency on its own motion or on request of a party shall order a rehearing.

(3) A request for a rehearing shall be filed within the time fixed by this

act for instituting proceedings for judicial review. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.